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IN THE

Supreme Court of the United States

October Term, 1986

THE BOARD OF AIRPORT COMMISSIONERS OF THE CITY OF LOS ANGELES, et al.,

Petitioners,

v.

JEWS FOR JESUS, INC., et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF THE RUTHERFORD INSTITUTE, AND THE RUTHERFORD INSTITUTES OF ALABAMA, COLORADO, CONNECTICUT, DELAWARE, FLORIDA, GEORGIA, KENTUCKY, MICHIGAN, MINNESOTA, MONTANA, PENNSYLVANIA, TENNESSEE, TEXAS, VIRGINIA AND WEST VIRGINIA, AMICI CURIAE, IN SUPPORT OF THE RESPONDENTS

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INTEREST OF AMICI CURIAE*

This case presents important issues concerning the freedom of speech for all Americans. The American tradition of free and open discourse in public places has contributed greatly to the success of our democracy. The Petitioners would drastically restrict this freedom. Their First Amendment theory would permit legislators to circumscribe severely speech activities in virtually all public places save parks, streets and sidewalks. This is not only inconsistent with American tradition and this Court's First Amendment cases, but it also poses a grave threat to freedom of

*Counsel of record to the parties in this case have consented to the filing of this brief and letters of consent have been filed with the Clerk pursuant to Rule 36.

speech as we now know it in this country. The Rutherford Institute is opposed to this attempt to restrict free speech on generally accessible public property and believes that the decision of the Court of Appeals should be forcefully affirmed as fully consistent with the mandate of the First Amendment.

Amici Curiae are non-profit religious corporations named for Samuel Rutherford, a 17th-century Scottish minister and rector at St. Andrew's University. With state chapters in Alabama, Colorado, Connecticut, Delaware, Florida, Georgia, Kentucky, Michigan, Minnesota, Montana, Pennsylvania, Tennessee, Texas, Virginia and West Virginia and its national office in Manassas, Virginia, the Rutherford Institute undertakes to assist litigants and to participate in significant cases relating to First Amendment freedoms. Counsel for *Amici Curiae* have specialized in litigation in state and federal courts and have participated as counsel for *amici curiae* in previous cases before this Court. The Rutherford Institute believes the expertise of its counsel will be of assistance to the Court in this case.

Statement Of Facts

The facts have been stipulated by the parties and are found in Appendix 1 to the Petitioners' Petition for a Writ of Certiorari filed in this Court.

Summary of Argument

The theory advanced by the Petitioners in this case, if sustained, will inevitably result in the reduction of countless numbers of public forums in this country and will severely restrict the traditional marketplace of ideas. This is so because under the Petitioners' theory, legislative and other governmental agencies would, in effect, be permitted to restrict or regulate speech on virtually *all* public property, except parks, streets and sidewalks, in order to accomplish governmental objectives. The problem with this analysis is that it ignores five decades of this Court's decisions concerning the traditional public forum, as well as hard facts about the speech in question, the nature and characteristics of the forum involved and the justifica-

tions for exclusion of citizens from public property that, in many instances, as in the present case, is free, open and generally unhindered by governmental interference.

The Petitioners' argument is based principally upon dicta from three of this Court's recent *non-public* forum cases, *Cornelius v. NAACP Legal Defense and Education Fund, Inc.* 105 S. Ct. 3439 (1985) (Combined Federal Campaign is a non-public forum), *City Council v. Taxpayers for Vincent,* 466 U.S. 789 (1984) (public utility poles are non-public forum), and *Perry Education Association v. Perry Local Educators' Association,* 460 U.S. 37 (1983) (public school mail system is a non-public forum). Seizing upon language from these opinions, the Petitioners deduce that public property becomes a traditional public forum—and therefore open for speech activities—only if its principal purpose is the free exchange of ideas. Because the principal purpose of an airport is air transportation and aid to the traveling public, and not the free exchange of ideas, it follows that it is not a traditional public forum. Government may therefore restrict or regulate speech activities in such a forum, or so the argument goes.

The defects in this reasoning are obvious from the very nature and character of the forum in question. The Central Terminal Area of Los Angeles International Airport is open to the general public on a twenty-four-hour basis. Like parks, streets and sidewalks, the walkways, lobbies and meeting areas of the Central Terminal Area are municipal thoroughfares where groups of people gather, congregate and traverse, places which are "natural and proper" for all kinds of protected expression. *Schneider v. State,* 308 U.S. 147 (1939). This Court should take judicial notice of the fact that countless political and other rallies have been staged in airports and other transportation terminals. Sports teams, public officials, public figures, world-renowned ballet companies, symphonies and rock groups, and even fugitives—you name it—have been variously welcomed, interviewed and/or greeted at airports, whether by mass demonstrations, high school bands, cheerleaders, fans, news broadcasters or members of the general public. Even

the ordinary, predominant and diverse expression of individual travelers, spectators or greeters is no less similar to or protected than the expression in which the Respondents have sought to engage. It is clear, therefore, that the general nature of the property in this case is not and cannot be described as dedicated exclusively to air commerce and navigation. Rather, the nature of the property and its compatibility with the types of expressive activities carried on there suggest that the proper constitutional status of the forum is in the nature of a traditional public forum. *Police Department of Chicago v. Moseley,* 408 U.S. 92 (1972); *Grayned v. City of Rockford,* 408 U.S. 104 (1972).

The facts of this case, in any event, evidence a clear governmental intent to establish a public forum. On the one hand, Resolution No. 13787 bans "First Amendment activities," but on the other, it gives the government the right, in effect and practice, to advance speech that in its opinion promotes air commerce and navigation. Government becomes the arbiter of what topics and what types of speech will be permitted in the airport. Thus, commercial advertising, sale and distribution of printed matter, T-shirt and clothing slogans, broadcast journalism, certain types of free literature distribution, certain types of displays, the Christian Science reading room, and other expressive activities are permitted by the Petitioners.

It is axiomatic, and has been for decades under this Court's public forum cases, that government "may not select which issues are worth discussing or debating in public facilities....Once a forum is opened up to assembly and speaking by some groups, government may not prohibit others from assembly or speaking on the basis of what they intend to say." *Police Department of Chicago v. Moseley,* 408 U.S. 92, 96 (1972). Any distinctions drawn with regard to content or subject matter must be carefully tailored to meet the asserted governmental objectives. The distinctions drawn by the policy in this case are highly subjective, overbroad, and suppress "undesirable" speech. As such, the policy is unconstitutional.

The policy also fails to give fair warning about the kinds of expression that are permitted, and, owing to its incurable ambiguity, is substantially overbroad and unconstitutionally vague. A demonstration by air traffic controllers in the Central Terminal Area about air traffic safety would ostensibly promote air commerce and navigation—and yet it would also appear to be banned. An offer of prayer to passengers facing flight in difficult weather conditions would constitute aid to the traveling public. And yet, this too would appear to be banned. In short, the policy prohibits a broad range of protected expressive conduct. Moreover, it is not clear what is and what is not permitted, leaving the public in a quandry and permitting officials to pursue their personal predilections with respect to what speech affects air commerce and navigation, and thus what will or will not be permitted speech. *Smith v. Goguen,* 415 U.S. 566, 575 (1974); *Thornhill v. Alabama,* 310 U.S. 88 (1940); *Shuttlesworth v. Birmingham,* 394 U.S. 147 (1969). For these reasons, the policy implemented by the Resolution chills the exercise of First Amendment rights because of its overbreadth and vagueness.

ARGUMENT

I.

Petitioners' First Amendment Theory Presents A Threat To Free Speech Generally And Should Be Unequivocally Rejected As Inconsistent With The First Amendment And This Court's Cases Interpreting The First Amendment.

The overriding issue in this case is, plainly and simply, how free will speech be in this country. Petitioners have seized upon language in this Court's recent opinion in *Cornelius v. NAACP Legal Defense and Educational Fund, Inc.,* 105 S. Ct. 3439 (1985), as grounds to impose "speechless" zones on otherwise generally accessible public property. The Petitioners argue that unless a par-

ticular public property has as its "principle [sic] purpose"[1] the free exchange of ideas, such property is not a traditional public forum and speech thereon may be restricted and/or otherwise regulated by legislative fiat. Applied to the facts of this case, the Petitioners' theory holds that because airport terminal facilities have as their "principle [sic] purpose the promotion of air transportation and aid to the traveling public"[2] and not the free exchange of ideas, they are not a traditional public forum.

Petitioners' argument is delusively simple. "It mistakes a definition for a syllogism."[3] Carried to its rational end, speech on virtually all publicly owned property could be eliminated by legislative act, save parks, streets and sidewalks. Indeed, even the latter would have difficulty surviving Petitioners' test since their "principal purpose" is to facilitate recreation and/or vehicular or pedestrian traffic. Parks, streets and sidewalks are rescued only by the explicit language of this Court's precedents ("the titles of streets and parks...have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions"[4]).

Petitioners' theory is not only mistaken, but it also ignores the values inherent in the First Amendment: (1) the idea that men and women are free to express their thoughts in order to enhance their personal growth and self-realization, (2) the concept of a free marketplace of ideas, (3) the safety-valve theory, and (4) the idea that our Founders did not exalt order at the cost of fundamental rights. For a scholarly summation of the values underlying the First Amendment, *see* G. Stone, L. Seidman, C. Sunstein and M. Tushnet, *Constitutional Law,* 931-937 (1986); *see also*

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[1]*See* Petitioners' Petition for Writ of Certiorari at 8.

[2]*Id.* at 9.

[3]The words are Dean Ely's used in another context. *See* Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade,* 82 Yale L.J. 920, 924 (1973).

[4]*Hague v. CIO,* 370 U.S. 496, 515 (1939). *See also Schneider v. State,* 308 U.S. 147, 163 (1939); *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc.,* 391 U.S. 308, 315 (1968).

Whitney v. California, 274 U.S. 357, 375-377 (1927) (Brandeis, J. concurring).

The likely result of Petitioners' novel constitutional theory is a tragic and enormous reduction of countless public forums that have been traditionally used by, among others, the holders of unpopular, disturbing or nonconforming viewpoints. The prevailing consensus has always been uncomfortable with controversial speech, be it religious, political or social. Consider, for example, the facts in *Cantwell v. Connecticut,* 310 U.S. 296 (1940) (provocative religious speech in Catholic neighborhood), or *Tinker v. Des Moines Independent School District,* 393 U.S. 503 (1969) (Vietnam protest in public school setting), or *Cohen v. California,* 403 U.S. 15 (1971) ("F__CK the Draft" protest sewn on jacket worn in public court house) or *Smith v. Goguen,* 415 U.S. 566 (1974) (American flag sewn on seat of trousers). Given the proclivity of legislative and bureaucratic agencies to reflect conventional or prevailing views, the creation of "speechless" zones would be too tempting to officials who prefer, for reasons often unknown, to avoid any confrontation with unpopular, disturbing, or nonconforming viewpoints that are inconvenient or unpleasant to accommodate.

Not only will the inevitable reduction of numerous public forums restrict the traditional marketplace of ideas, but the wholesale rollback will also disproportionately burden speakers and groups lacking the money, popularity or charisma necessary to command attention in the few remaining forums or secure coverage by the media. It follows that Petitioners' denial of ample access for speakers attempting to reach the traveling public may even encourage activities that are potentially more disruptive in airports, such as civil disobedience, particularly over pressing issues of the day. It is well to recall Brandeis' admonition that "[t]hose who won our independence" knew that the "path of safety" lies in free discussion. *Whitney v. California* 274 U.S. at 375 (Brandeis, J. concurring).

Petitioners' theory is grounded largely in dicta contained in the *Cornelius* majority opinion, echoing similar dicta

from two prior cases, *City Council v. Taxpayers for Vincent,* 466 U.S. 789 (1984) and *Perry Education Association v. Perry Local Educators' Association,* 460 U.S. 37 (1983). *Stare decisis* takes on a distorted meaning when the Petitioners, who ironically accuse the Court of Appeals of disregarding "the essential holdings of this Court,"[5] choose to rely primarily upon three cases which involved forums that are a far cry from traditional speech in a traditional public forum—i.e., the Combined Federal Campaign, utility poles and a school mail system. This Court should, therefore, categorically reject Petitioners' constitutional theory, which—applying dicta from cases with significantly different facts—constructs a fictional wonderland where constitutional rights are sacrificed for fine legal distinctions that bear little, if any, relationship to reality.[6]

No doubt "speechless" zones may be created on certain government property with greatly restricted public access, such as jails, mail systems or military bases. However, the

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[5]See Petition for Writ of Certiorari at 7.

[6]As Judge Arlin Adams astutely observed in a public forum case involving a public stadium:

> I am concerned that an analysis which relies too heavily on whether an area, such as a shopping center or sports complex, has traditionally been regarded as a public forum fails to come to grips with the fact that legal concepts need to evolve to reflect underlying social realities.

ISKON v. New Jersey Sports and Exposition Authority, 691 F. 2d 155 (3rd Cir. 1982) (Statement of Circuit Judge Adams sur denial of petition for rehearing). *Compare, Lehman v. City of Shaker Heights,* 418 U.S. 298 (1974) *with U.S. Southwest Africa/Namibia Trade & Cultural Council v. United States,* 708 F. 2d 760 (D.C. Cir. 1983).

The three recent cases cited by Petitioners were not intended by this Court as a retreat to Justice Holmes' anachronistic view of the public forum that "the right to absolutely exclude all right to use [public property] necessarily includes the authority to determine under what circumstances such use may be availed of, as the greater power contains the lesser." *Davis v. Commonwealth,* 167 U.S. 43, 48 (1897), *affirming Commonwealth v. Davis,* 162 Mass. 510 (1895). That view has not survived this Court's determination that certain places are "natural and proper places for the dissemination of information and opinion." *Schneider v. State,* 308 U.S. 147, 163 (1939).

Petitioners read *Cornelius* to permit *any* governmental agency to legislate the scope of speech activity on virtually *any* public property even though the general public has access to and uses the property on a free and unrestricted basis. The Petitioners' own policy illustrates the inherent unconstitutionality of such legislation. On the one hand, Petitioners have resolved that "the Central Terminal Area at Los Angeles International Airport is not open for First Amendment activities by any individual and/or entity." See Resolution No. 13787. On the other hand, they have resolved that the Central Terminal Area "is only to be used for the promotion and accommodation of air commerce and air navigation or uses incidental thereto." *Id.*

Although Resolution No. 13787 ostensibly imposes an absolute ban on all "First Amendment activities," the exception it carves out, in the name of promoting air commerce and air navigation, permits the Petitioners to pick and select among types of speech of which they approve and sanction. Thus, the Petitioners allow commercial advertising, T-shirt and clothing slogans, literature distribution at "Olympic Family" information booths, broadcast speech, displays on international trade of plants and animals, the Christian Science reading room, printed literature for sale, children's artwork and the limitless other kinds of spontaneous speech activities—not unlike that engaged in by the Respondents—that occur in a public place with unrestricted access. This constitutional shell game allows government to approve speech in furtherance of its objectives while engaging in the fiction of imposing a "ban" on "First Amendment activities" of which it does not approve, a curious bit of "double speak" that should not be countenanced or sanctioned by this Court.

No government should be the arbiter of what is desirable or acceptable speech on generally used, open and readily accessible public property. Unless governmental power in such areas is narrowly limited to the advancement of especially important state objectives in a manner that constitutes the least restrictive infringement of First Amendment rights, the door is wide open for censorship. Free speech in facilities open and accessible to the general

public ought not to be redefined in accordance with the majority's view of what messages are worthy, otherwise making the First Amendment a virtual nullity. Surely, this was not the intended result of the Court's reasoning in *Cornelius.*

The issue presented in this case is not novel or wanting in precedent. Indeed, it has been presented numerous times and thoroughly considered and decided by various lower Federal and State courts. Well nigh universally, these courts have refused to uphold restrictions of the nature sought to be imposed by Petitioners. This well-established and well-considered line of precedents should not be arrogantly disregarded—as the Petitioners have suggested—as "out-dated and often times incorrect lines of case authority,"[7] but instead should be accorded the respect and weight that are due the cumulative wisdom of decades of litigation.

In virtually all of these lower court decisions, annoyance and inconvenience, or speculation about the effect of free speech on governmental efficiency or revenues have uniformly been rejected as justifications for restricting free speech activities where the governmental facilities were readily accessible to and used by the general public. These holdings by the Court of Appeals and other lower Federal and State courts represent an application of public forum principles that is more sensitive to First Amendment values than that advanced by Petitioners.

In addition to the 16 cases cited in the Respondents' Brief in Opposition to the Petition for a Writ of Certiorari, 14 other cases which generally uphold the line of reasoning of the Court of Appeals in other contexts are cited below for reference: *Southside Estates Baptist Church v. Board of Trustees,* 115 So. 2d 697 (Fla. 1959) (religious use of public school facilities); *National Socialist White People's Party v. Ringers,* 473 F. 2d 1010 (4th Cir. 1973) (racist, anti-semitic group's use of public school facilities); *Hennessey v. Independent School District No. 4, Lincoln County,* 552 P. 2d 1141 (Okla. 1976) (PTA use of public school facilities); *Resnick v. East Brunswick Town-*

[7]See Petition for Writ of Certiorari at 6.

ship Board of Education, 389 A. 2d 944 (N.J. 1978) (church use of public school facilities); *Knights of KKK v. East Baton Rouge School Board,* 578 F. 2d 1122 (5th Cir. 1978) (KKK use of public school facilities); *Jaffe v. Alexis,* 659 F. 2d 1018, (9th Cir. 1981) (Krishna speech and solicitation at California DMV office); *Dallas Association of Community Organizations for Reform v. Dallas County Hospital District,* 670 F. 2d 629 (5th Cir. 1982) (literature distribution in public hospital); *Project Vote v. Ohio Bureau of Employment Services,* 578 F. Supp. 7 (S.D. Ohio 1982) (promotion of voter registration at state unemployment office); *American Future Systems, Inc. v. Pennsylvania State University,* 568 F. Supp. 666 (M.D. Pa. 1983) (solicitation in state university student dormitories); *Country Hills Christian Church v. Unified School Dist. No. 512,* 560 F. Supp. 1215 (D. Kan. 1983) (use of public school facilities by church); *New York City Unemployed and Welfare Council v. Brezenoff,* 742 F. 2d 718 (2nd Cir. 1984) (solicitation of membership by welfare rights organization in public welfare office); *U.C. Nuclear Weapons Labs v. Lawrence Livermore Lab.,* 201 Cal. Rptr. 837 (Cal. App. 1 Dist. 1984) (literature display and auditorium access in government nuclear weapons lab visitor center); *Cinevision Corporation v. City of Burbank,* 745 F. 2d 560 (9th Cir. 1984) (access to municipally owned amphitheatre); and *Carreras v. City of Anaheim,* 768 F. 2d 1039 (9th Cir. 1985) (solicitation at city stadium). The weight of reasoning contained in the 16 cases cited by the Respondents and the 14 cases cited above should be accorded proper respect in this Court's consideration of the present case.

II.

The Central Terminal Area Of Los Angeles International Airport Is A Traditional Public Forum Subject Only To Reasonable Time, Place And Manner Restrictions.

As previously stated, the most recent decision of this Court with respect to the "public forum" doctrine is

BEST AVA

Cornelius v. NAACP Legal Defense and Educational Fund, Inc., 105 S. Ct. 3439 (1985), holding that the Combined Federal Campaign constituted a "non-public"—as opposed to "traditional" or "limited"—public forum. Although the nature of the "forum" in *Cornelius* was drastically and significantly different from the forum in this case, *Cornelius* does set forth a framework for analysis in its summary of public forum principles this Court has applied in such cases. The holding in *Cornelius* was based upon an analysis of several factors: (1) whether the speech in question was protected speech, (2) the nature of the forum and its public or non-public characteristics and (3) the justification for exclusion from the relevant forum viewed against the requisite constitutional standard applicable to that type of forum. *Id.* at 3446-3447.

A. Nature Of The Speech

The initial inquiry is to determine whether the speech in question is protected speech. There can be little question that the Respondents' speech activities are protected by the First Amendment. The Petitioners do not dispute the assertion that such activities constitute protected speech. In any event, this Court's cases on picketing,[8] leafleting,[9] and solicitation,[10] as well as cases governing speech by conduct[11] in public settings, are too numerous and extensive to deny that speaking and leafleting in a public place "would reasonably be understood by the viewer as communicative," *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 294 (1984), and, therefore, speech protected by the First Amendment.

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[8] *Thornhill v. Alabama*, 310 U.S. 88 (1940); *Edwards v. South Carolina*, 372 U.S. 229 (1963).

[9] *Schneider v. State*, 308 U.S. 147 (1939); *Martin v. Struthers*, 319 U.S. 141 (1943); *Saia v. New York City*, 334 U.S. 558 (1948).

[10] *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620 (1980); *Cornelius*, 105 S. Ct. 3439 (1985).

[11] *Spence v. Washington*, 418 U.S. 405 (1974); *Tinker v. Des Moines Independent School District*, 393 U.S. 503 (1969).

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B. The Relevant Forum

There being protected speech in this case, it becomes necessary to determine the relevant forum. *Cornelius* determined that "a speaker must seek access to public property or to private property dedicated to public use to evoke First Amendment concerns...." *Cornelius,* 105 S. Ct. at 3449. Moreover, this Court, in *Cornelius,* recognized that "[w]hen speakers seek general access to public property, the forum encompasses that property." *Id.*

In this case, Respondents sought to speak and distribute literature inside the Central Terminal Area in areas and places that were open to the general public without restriction or limitation. Importantly, they did *not* seek access for speech purposes in rented spaces, or in office areas or in airline employee lounges or other restricted spaces, or in restaurants, stores or shops, or in restricted operational areas or other forums on the property constituting the Los Angeles International Airport. Rather, they sought access only to the walkways and open spaces of the Central Terminal Area—areas that were free and open to the public with little or no restriction and characterized by open and free expression. The relevant forum in this case—"tailored" to "the perimeters of a forum within the confines of government property"—encompasses only the free and open areas of the Central Terminal Area. *Cornelius,* 105 S. Ct. at 3449.

C. The Nature Of The Forum

The next inquiry is to determine the nature and characteristics of the forum. If the Central Terminal Area is a "traditional" public forum, then exclusion of Respondents on the basis of the subject matter of their speech can occur "only when the exclusion is necessary to serve a compelling state interest and the exclusion is narrowly drawn to achieve that interest." *Cornelius,* 105 S. Ct. at 3448. If the Central Terminal Area is a "designated" public forum, i.e., a non-traditional forum opened by intentional governmental policy, any exclusion is

governed by the same standard as the traditional public forum. *Perry Education Association v. Perry Local Educators' Association,* 460 U.S. 37, 46 (1983). Finally, if the Central Terminal Area is a non-public forum, access "can be restricted as long as the restrictions are 'reasonable' and [are] not an effort to suppress expression merely because public officials oppose the speaker's views."[12] *Cornelius,* 105 S. Ct. at 3448, *citing Perry,* 460 U.S. at 46.

In its review of the relevant precedents, this Court in *Cornelius* viewed *Widmar v. Vincent,* 454 U.S. 263 (1981) (university campus), *Madison School District v. Wisconsin Employment Relations Commission,* 429 U.S. 167 (1976) (school board meeting) and *Southeastern Promotions Ltd. v. Conrad,* 420 U.S. 546, 555 (1975) (municipal auditorium) as cases having "many characteristics of a traditional public forum" and evidencing a clear government intent to create a public forum, in part from the nature of the meetings involved and the design, dedication and actual use of the property involved. *Cornelius,* 105 S. Ct. at 3449-3450. Per contra, the *Cornelius* majority viewed *United States Postal Service v. Council of Greenburgh Civic Association,* 453 U.S. 114 (1981) (mail system), *Jones v. North Carolina Prisoners' Labor Union,* 433

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[12] *Perry,* of course, expounded a three-tier public forum analysis drawn from the Court's prior decisions. These include: (1) streets, parks, sidewalks and the like that are traditionally public forums; (2) "place(s) or channel(s) of communication" created by government designation for assembly and speech, for use by certain speakers or for the discussion of certain subjects and (3) non-public forums, created by government, but not open except pursuant to reasonable government policies. *See Cornelius,* 105 S. Ct. at 3449.

Perry implicitly and *Cornelius* explicitly suggest that the second-tier "designated" or "limited" public forum arises *not* from government inaction or permitting limited discourse, "but only by [government] intentionally opening a non-traditional forum for public discourse." *Id.; Perry,* 460 U.S. at 47. Thus, *Cornelius* appears to go beyond *Perry* to hold that explicit government policy and practice are paramount in ascertaining whether government intends to create a "designated" public forum. Nevertheless, "the nature of the property" and its "compatibility with expressive activity" are also particularly relevant in discerning the government's intent to create a forum. *Cornelius,* 105 S. Ct. at 3449.

U.S. 119 (1977) (jail), *Lehman v. City of Shaker Heights,* 418 U.S. 298 (1974) (bus advertising space), *Greer v. Spock,* 424 U.S. 828 (1976) (military base), *Adderley v. Florida,* 385 U.S. 39 (1966) (jail) and, indeed, *Perry* itself (mail system), as cases with non-public forums resulting from a government policy denying general public access, requiring permission for use and seeking to avoid disruptive effects that might arise if general access were given.

Applying these principles to the present case, it should first be observed that an airport terminal with a free flow of traffic and robust and varied expression, both oral and written, is more akin to a park, street or sidewalk than even a university campus, school board meeting or municipal auditorium, let alone the Combined Federal Campaign, an amorphous school mail system, a jail, a military base or advertising space on city transit buses. Like public streets and sidewalks, the Central Terminal Area walkways, lobbies and meeting places are areas where large groups of people gather, congregate and traverse, places which, in this Court's words, are "natural or proper" for all kinds of protected expressive activities, including the dissemination of information and opinion. *Schneider v. State,* 308 U.S. 147, 163 (1939).

Likewise, speech in the Central Terminal Area is traditional speech activity—varied in its manifestations, soft, loud, vibrant or robust, but, in any event, generally uninhibited. Except there were government censorship of certain speech in the Central Terminal Area, it is difficult to imagine a setting in which more diverse speech could be found. Indeed, it is legitimate to ask whether transportation terminals and other similar public facilities open to the general public on a twenty-four-hour basis are not, in the context of modern society and the technological revolution, in many respects the sidewalks and parks of the modern era—i.e., functionally equivalent places where crowds and people congregate and traverse and carry on all sorts of dialogue relating not only to the setting or the events being held, but to issues of the day as well.

The Petitioners argue that "[a]n airport does not have as a principal purpose, a long tradition of or a dedication

to public assembly and debate." *See* Brief for the Petitioners at 15. This is simply not true. This Court can take judicial notice that countless political and other rallies have been staged at airports and other transportation terminals. Sports teams, public officials, public figures, world-renowned ballet companies and symphonies, rock groups, fugitives—you name it—have been variously welcomed, interviewed and/or greeted at airports, whether by mass demonstrations, high school bands, cheerleaders, fans, news broadcasters or members of the general public. These speech and assembly uses and activities are simply part of the territory. As such, public transportation terminals are no less traditionally dedicated to assembly and debate than are streets and sidewalks. By their very nature, their purpose is not—and, indeed, cannot be—exclusively transportation or aid to the traveling public.

Petitioners also raise the spectre that, if the Respondents prevail, *every* government building will become a traditional public forum, with government never able to restrict facilities to their intended purposes. *See* Brief for the Petitioners at 15, 22 and 26. Experience alone shows that this parade of horribles is not true. Governments do restrict—and, indeed, the Petitioners have restricted—*access* to their property. For example, the Stipulation of Facts in this case states that one part of the Los Angeles International Airport is "the restricted or 'field side' area containing runways, taxiways, airline maintenance and cargo facilities, aircraft loading ramps and various aircraft service facilities...." *See* Stipulation of Facts, paragraph 4, Appendix 1 to Petition for Writ of Certiorari. There is no contest—nor is there any doubt—that the Petitioners can and do restrict access to these facilities. Likewise, governments everywhere can and do restrict access to a legion of government property—including all or a portion of hallways in the building housing this Court and countless other government buildings in this country. This restricted access is not only for security reasons, but also because First Amendment expression in such areas "is basically incompatible with the normal activity of [those] particular places at [those] particular time[s]." *Grayned v. City of*

Rockford, 408 U.S. 104, 116 (1972). Moreover, unlike the present case, access to such property is restricted without regard to the content or subject matter of the speech in question. In other words, public facilities would not become "Hyde Parks open to every would-be pamphleteer and politician" (*Lehman v. Shaker Heights,* 418 U.S. 298, 304 (1974)) unless there was a proper determination that free speech activities were compatible with the nature of the forum and there was no justification for exclusion.

The normal activity of the Central Terminal Area is, of course, to obtain transit by air, but the size, diversity and freedom of the forum by definition produce an amalgam of expression. This includes not only the speech activities permitted by the Petitioners, but also the spontaneous, demonstrative, interactive, spectative, vigorous and exuberant speech of terminal users, all unhindered by government interference (except for the proposed selective enforcement of Petitioners). The nature of the government property and its compatibility with the types of expressive activities carried on there suggest, therefore, as the Court of Appeals concluded, that the proper constitutional status of the forum is in the nature of a traditional public forum. *Police Department of Chicago v. Moseley,* 408 U.S. 92 (1972); *Grayned v. City of Rockford,* 408 U.S. 104, 116 (1972).

III.

The Central Terminal Area Of Los Angeles International Airport Is A Designated Public Forum In Which Respondents May Not Be Selectively Excluded On The Basis Of The Subject Matter Or Content Of Their Expression.

Whether or not the Central Terminal Area is a traditional public forum, the facts in this case, in any event, evidence a clear government intent to establish a public forum. As previously stated, although Resolution No. 13787 ostensibly bans all First Amendment activities, it nevertheless

permits a wide range of activities that promote and accommodate air commerce and air navigation. These latter activities apparently include, by Petitioners' practice, commercial advertising, T-shirt and clothing slogans, broadcast journalism, certain types of literature distribution, certain types of displays, the Christian Science reading room, printed literature for sale and other expressive activity which, *in the opinion of the Petitioners,* purportedly advance air commerce and navigation. Moreover, but for Petitioners' newly adopted policy, the custom in the Central Terminal Area for over 10 years has been to permit virtually *all* First Amendment activities. In this context, where the state has expressly and intentionally—by policy and practice—opened up a forum, it cannot at the same time exclude certain types of speech based on content or subject matter.[13]

Clearly, the large number of exceptions to the ban imposed by Resolution No. 13787 are content based. The official decision as to whether a message accommodates air navigation and commerce or aid to the traveling public depends ultimately on an evaluation of the message's content and effect on "commerce." It is incredible to suppose that the censorship practiced at the Los Angeles International Airport is unrelated to the suppression of ideas or that it is ideologically neutral. Indeed, countless sets of messages are proscribed based on an evaluation of whether they advance a topic having some tenuous connection with traffic congestion, intrusiveness or some other purpose articulated as a justification for the Petitioners' restriction on protected speech.

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[13]Dicta in *Perry* and *Cornelius* may be read to allow government to restrict speech in designated public forums that is dissimilar in kind from speech designated by government as permissible. Assuming the point arguendo, the religious speech of Respondents in this case is sufficiently similar to the religious message of the Christian Science reading room as to prevent any exclusion of Respondents' speech. Moreover, First Amendment distinctions should not be made to depend upon the financial ability of a speaker to rent space in the designated public forum. Finally, if Petitioners are implying that airport officials have the same rights as private property owners to restrict speech on their property, this Court has already held that owners of private property in California do not have the constitutional right to suppress the dissemination of pamphlets. *See PruneYard Shopping Center v. Robins,* 447 U.S. 74 (1980).

The First Amendment's hostility to content-based regulation extends to bans that prohibit "public discussion of an entire topic." *Consolidated Edison Co. v. Public Service Commission of New York,* 447 U.S. 530, 537 (1980). Content-based discrimination is not rendered "any less odious" because it distinguishes "among entire classes of ideas, rather than among points of view within a particular class...." *Lehman v. City of Shaker Heights,* 418 U.S. 298, 316 (1974) (Brennan, J., dissenting). Moreover, content-based bans that prefer commercial speech over political, religious or other expression cannot survive judicial scrutiny under the principles of *Metromedia, Inc. v. San Diego,* 453 U.S. 490 (1981) (A content-based distinction that affords greater access to commercial speech over non-commercial speech is an impermissible distinction). For a content-based restriction to survive strict judicial scrutiny, the government has a strong burden of persuasion to show that its restriction is "precisely tailored," neither over-inclusive nor under-inclusive, and that a no less discriminatory classification is practicable for furthering its bona fide compelling purposes. *See Police Department of Chicago v. Moseley,* 408 U.S 92 (1972); *Carey v. Brown,* 447 U.S. 455 (1980); *Erznoznik v. City of Jacksonville,* 422 U.S. 205 (1975).

The present ban has been justified on several grounds: (1) congestion and impeded flow of passenger traffic, (2) incompatibility with the character and function of the Central Terminal Area and (3) unwanted and disruptive intrusions caused by the speech in question. None of these grounds supports an absolute and virtually total ban on so many First Amendment activities, particularly when the Petitioners permit similar activities which in fact cause or contribute to the same problems. For example, television broadcasts in the Central Terminal Area generate as much or more congestion than prosyletizing ever would. The Christian Science reading room is no less compatible with the character and function of the Central Terminal Area than a sole individual distributing written leaflets reflecting other religious views. Moreover, a person who is a

witness to his faith is no more disruptive or intrusive than an off-color commercial advertisement or a loud, raucous crowd welcoming home an athletic team, or an offensive passenger boasting rashly of a football victory. And yet, the Petitioners would somehow censor the former because it is, in their opinion, "non-airport related speech," whatever that means.

The restrictions in this case are thus not precisely tailored. They are over-inclusive and under-inclusive and discriminate unevenly between governmentally favored and non-favored expression. *Police Department of Chicago v. Moseley,* 408 U.S. 92 (1972); *Carey v. Brown,* 447 U.S. 455 (1980); see also *Niemotko v. Maryland,* 340 U.S. 268 (1951) (Denial of park access to Jehovah's Witnesses but no other fraternal organizations violates freedom of speech guarantee). Generally "[s]elective exclusions from a public forum may not be based on content alone, and may not be justified by reference to content alone." *Police Department of Chicago v. Moseley,* 408 U.S. at 96.

This Court has only recently reaffirmed "the fundamental principle that underlies [its] concern about 'content-based' speech regulations" in *City of Renton v. Playtime Theatres, Inc.* 106 S. Ct. 925, 929 (1986), indicating that "government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views." *Police Department of Chicago v. Moseley,* 408 U.S. at 95-96. In sum, "any content-based regulation that is justified by a compelling state interest also must be narrowly drawn and must constitute the *least* restrictive means of furthering the governmental interest." *Cinevision Corporation v. City of Burbank,* 745 F. 2d 560, 571 (9th Cir. 1984) *cert. den.* ____ U.S. ____, 105 S. Ct. 2115 (1985) (emphasis added). The Petitioners' policy must, therefore, fail as an impermissible content control. As this Court stated in *Police Department of Chicago v. Moseley,* 408 U.S. 92, 96 (1972):

> Necessarily, then, under the Equal Protection Clause, not to mention the First Amendment itself, government may not grant the use of a forum to

> people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views. And it may not select which issues are worth discussing or debating in public facilities. There is an "equality of status in the field of ideas," and government must afford all points of view an equal opportunity to be heard. Once a forum is opened up to assembly or speaking by some groups, government may not prohibit others from assembling or speaking on the basis of what they intend to say. Selective exclusions from a public forum may not be based on content alone, and may not be justified by reference to content alone.

The case law is clear that government policy restricting speech on the basis of content or subject matter must be evenhanded. Any distinctions drawn with regard to content or subject matter must be carefully tailored to meet the asserted governmental objective, which must also serve a legitimate public interest. The distinctions drawn by the policy in this case are highly subjective, overbroad and aimed at suppressing "controversial" speech. As such, the policy is unconstitutional.

IV.

The Imprecisely Worded Resolution Fails To Give Persons Seeking Access To The Public Forum Fair Warning About The Kinds Of Expression That Are Permitted, And Owing To Its Incurable Ambiguity, Is Substantially Overbroad And Unconstitutionally Vague.

The Resolution in question is void for vagueness because it does not give fair warning as to what expression will be permitted. For example, a demonstration or leafleting by air traffic controllers in the Central Terminal Area about air traffic safety would ostensibly promote air commerce and navigation and would be compatible with

the character and function of the Central Terminal Area; so too, would an offer by the Respondents of prayer with passengers facing flight in difficult weather conditions. Likewise, the offer of free literature to read during flight would promote air commerce and navigation as much as the commercial sale of such literature. And yet, all of these activities are obstensibly banned.

In First Amendment cases, the void for vagueness standard is unusually strict. *Hoffman Estates v. Flipside, Hoffman Estates,* 455 U.S. 489, 499 (1982). ("If...the law interferes with the right of free speech or association, a more stringent vagueness test should apply.") A statute can be unconstitutionally vague on its face even if it is not vague in all of its permissible applications, *Kolender v. Lawson,* 461 U.S. 352, 358-359 n. 8 (1983), especially when, as in the instant case, the absence of sufficient guidelines allows various governmental officials to "pursue their personal predilections." *Smith v. Goguen,* 415 U.S. 566, 575 (1974); cf. *Shuttlesworth v. Birmingham,* 394 U.S. 147, 150-151 (1969) (Statute's uncertain reach delegates to officials standardless discretion which permits unjustified suppression of First Amendment freedoms in the public forum).

In the instant case, as in *Lovell v. Griffin,* 303 U.S. 444 (1938), since no attempt was made to tailor the restrictions to a substantive evil unrelated to the suppression of ideas, the Resolution creates an unacceptable risk that it will be used to suppress speech. In *Thornhill v. Alabama,* 310 U.S. 88 (1940), the Court concluded that the very existence of some broadly written statutes may have such a deterrent effect on free expression, and should, therefore, be subject to challenge even by a party whose own conduct may be unprotected. See also *Gooding v. Wilson,* 405 U.S. 518 (1972); *Lewis v. City of New Orleans,* 415 U.S. 130 (1974). As the Court stated in the *Thornhill* case:

> It is not merely the sporadic abuse of power by the censor but the pervasive threat inherent in its very existence that constitutes the danger to freedom of discussion....The existence of...a statute, which readily lends itself to harsh and discrimina-

> tory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure, results in a continuous and passive restraint on all freedom of discussion that might reasonably be regarded as within its purview.

Thornhill v. Alabama, 310 U.S. at 97-98.

The challenged Resolution is invalid on its face. Even if a more narrowly drawn time, place and manner restriction could be applied, in some circumstances, to the Respondents, it is facially invalid because of its vagueness, and because "it seeks to prohibit such a broad range of protected conduct that it is unconstitutionally overbroad." *City Council v. Taxpayers for Vincent,* 466 U.S. 789, 796 (1984). Moreover, there is "no readily apparent construction [that] suggests itself as a vehicle for rehabilitating [it]...." *Dombrowski v. Pfister,* 380 U.S. 479, 491 (1965). Finally, the number of impermissible applications will no doubt dwarf the number of permissible applications of the Resolution, which "has the potential to repeatedly chill the exercise of expressive activity by many individuals...." *New York v. Ferber,* 458 U.S. 747, 772 (1982).

CONCLUSION

The context of the public property in this case is in the nature of a traditional public forum or a designated public forum in which the state may not censor or draw distinctions with respect to the content of speech. *See Police Department of Chicago v. Moseley,* 408 U.S. 92 (1972); *Southeastern Promotions, Ltd. v. Conrad,* 420 U.S. 546 (1975); *Madison School District v. Wisconsin Employment Relations Commission,* 429 U.S. 167 (1976); *Carey v. Brown,* 447 U.S. 455 (1980); and *Widmar v. Vincent,* 454 U.S. 263 (1981). The speech activity in those cases, as in the present case, was not only traditional speech activity, but was also subjected to the same type of discriminatory treatment, censorship and, perhaps, animus that has been directed at Respondents' message. This sort of unequal

treatment of ideas was not permitted to stand in those cases, nor should it be in this case.

Whether or not this Court determines the Central Terminal Area to be a traditional public forum, it is inexorably one by designation. The Resolution evidences a clear intent to create a public forum. Moreover, there is no other valid basis, such as disruption or inconvenience, to justify the exclusion of Respondents when other speech activities having the same effects are permitted. The Petitioners' justifications do not add up to a particularized, compelling state goal that justifies overbroad, unnecessary and selectively hostile restrictions on protected expression and association.

Perhaps one person's speech is another person's blasphemy. Nevertheless, in one of the Supreme Court's earliest cases, *Cantwell v. Connecticut,* 310 U.S. 296, 310 (1940), this Court stated:

> In the realm of religious faith, and in that of political belief, sharp differences arise. In both fields the tenets of one man may seem the rankest error to his neighbor. [Bitter controversies may occur but] the people of this nation have ordained in the light of history, that, in spite of the probabilities of excesses and abuses...these liberties are, in the long view, essential to the enlightened opinion and right conduct on the part of the citizens of a democracy.

In short, "...a State may not unduly suppress free communication of views, religious or other, under the guise of conserving desirable conditions." *Id.* at 308.

It is crystal clear that the Petitioners' exclusion of certain First Amendment activities from a public forum is neither a content-neutral nor a permissible policy. The ostensibly direct, nearly total and permanent ban violates Respondents' First Amendment freedoms of speech, association and assembly. The Resolution also violates the Equal Protection Clause of the Fourteenth Amendment. For these compelling reasons, the judgment of the Court of Appeals must be upheld.

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